APPENDIX

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

In the Matter of:
FIBERGLASS SPECIALTY CO., INC.,
Debtor.

In Proceedings for An Arrangement Under Chapter XI
BKCY 3-78-367

ORDER AUTHORIZING DEBTOR TO CONTINUE IN POSSESSION

At Saint Paul, in said District, on the 3rd day of April, 1978.

Fiberglass Specialty Co., Inc., the Debtor above named, having petitioned this Court for an Order authorizing it to remain in possession of its property and affairs, as defined in the attached Petition of Fiberglass Specialty Co., Inc., at the hearing whereof no notice was given, none being required and no adverse interests appearing thereat, and the Court being advised in all the premises being satisfied that it is in the best interest of the above-named Debtor, its estate and all creditors thereof; it is

ORDERED:

1. That Fiberglass Specialty Co., Inc., be, and it hereby is, authorized to remain in possession of its properties, business and affairs until further order of this Court.

2. That Fiberglass Specialty Co., Inc., be, and it hereby is, authorized to continue the operation of its business. Such operation shall be limited in the fashion and manner described in the Petition of Fiberglass Specialty Co., Inc. The debtor-in-possession shall not contract any unusual obligations either as to subject, matter or amount. The conduct of said business shall at all times be at the discretion of this Court. For such business, the debtor-in-possession shall be authorized to incur normal overhead for rent, utilities, insurance, payroll and other administrative expenses, but shall not incur any administrative expenses beyond that normally heretofore incurred by it. The above provisions shall not be construed as authorizing the debtor-in-possession to pay any indebtedness incurred prior to the filing of the Original Petition under Chapter XI by Fiberglass Specialty Co., Inc.

3. The debtor-in-possession shall cause to be opened a new set of books as of the date of the filing of the petition under Chapter XI, which set of books shall reflect all business transactions and occurrences affecting the operation and business of the debtor-in-possession from the date of filing of said Petition under Chapter XI.

4. The debtor-in-possession shall file with the undersigned Bankruptcy Judge a report of operations of the debtor-in-possession as may hereinafter be ordered.

5. The debtor-in-possession is authorized to retain present employees at rates of pay no greater than that existing on the date of the filing of the petition herein and is authorized to hire replacement employees in the event such is required or necessary.

6. That all persons, firms, corporations, their agents, servants and attorneys, including sheriffs, marshals and their deputies be, and they hereby are, enjoined and restrained

from commencing or continuing any suits or proceedings against the above-named Debtor in this proceeding or against any properties of the above-named Debtor until the entry of the final decree in this proceeding or until further order of this Court.

BY THE COURT:
/s/ JACOB DIM
Bankruptcy Judge

IN THE DISTRICT COURT OF THE UNITED STATES
DISTRICT OF MINNESOTA, THIRD DIVISION
IN BANKRUPTCY, No. 3-78-367(D)

In re:
FIBERGLASS SPECIALTY COMPANY, INC.,
Debtor.

FIBERGLASS SPECIALTY CO., INC.,
Plaintiff,
vs.
BOR-SON CONSTRUCTION, INC.,
Defendant.

FIBERGLASS SPECIALTY CO., INC.,
Debtor,
vs.
BOR-SON CONSTRUCTION, INC.,
Claimant.

FIBERGLASS SPECIALTY CO., INC.,
Debtor,
vs.
CREWMASTERS,
Claimant.

FINDINGS OF FACT, CONCLUSIONS OF LAW, MEMORANDUM, AND ORDER FOR JUDGMENT

The above-entitled matter came on for hearing before the undersigned, the Honorable Jacob Dim, Bankruptcy Judge, on November 8, 9, 15, 21 and 26, 1979. The last briefs were filed on February 7, 1980.

Appearing for plaintiff-debtor, Fiberglass Specialty Company, Inc. (hereafter "Fiberglass") were Mr. T. Jay Salmen, Esquire and Mr. Richard J. Gabriel, Esquire of the firm of Kueppers, Kueppers, Von Feldt and Salmen. Appearing for the defendant-claimant, Bor-Son Construction, Inc. (hereafter "Bor-Son") were Mr. Jonathan Morgan, Esquire and Mr. David J. Allen, Esquire of the firm of Briggs and Morgan. No answer or appearance was made by claimant, Crewmasters, Inc. (hereafter "Crewmasters").

FACTUAL BACKGROUND

This matter arose from a construction subcontract entered into on June 29, 1975 by Bor-Son as contractor and Fiberglass as subcontractor. Fiberglass agreed to design, manufacture, and install tank covers on a water pollution control facility being built in Esterville (sic), Iowa by Bor-Son. (Transcript, pp. 4-7). Fiberglass contracted with Crewmasters to provide labor for the installation. (T. 26-27).

Fiberglass received notice to commence work on the subcontract in December, 1976. (T. 215-216; Bor-Son Ex. 3 and 4). Fiberglass began work on the erection of the tank covers in March, 1977. It completed work in November, 1977. Upon completion, Bor-Son retained $66,191.31 of the contract money to ensure payment of all liens from the work of Fiberglass.

The subcontractors of Fiberglass filed liens and Bor-Son continued to retain the funds. On March 28, 1978, Fiberglass filed for an Arrangement under Chapter XI. On that date,

pursuant to Rule 11-44, an automatic restraint on any actions against the debtor and his property became effective. On April 3, 1978 an order from this court restrained every action and proceeding against Fiberglass and its property. On May 18, 1978, Bor-Son was notified of the filing and a demand was made for the funds retained by Bor-Son. (T. 163-165; Fiberglass Ex. 14). On September 18, 1978, Fiberglass commenced an action to recover the funds retained by Bor-Son.

On September 29, 1978, Bor-Son notified Fiberglass that certain doors installed by Fiberglass had to be replaced. Bor-Son told Fiberglass that the doors were defective and that they were still covered by the warranty of Fiberglass (Bor-Son Ex. 34). Fiberglass took no steps to correct the work and Bor-Son had the work done and backcharged Fiberglass (T. 252-254). The amount expended to replace the doors was $3,872.00.

On October 16, 1978, Bor-Son informed Fiberglass that all subcontractors would be paid by Bor-Son if they were not paid by Fiberglass prior to October 23, 1978. (Bor-Son Ex. 40). Bor-Son made the payments to the subcontractors to recover the money held by the City of Esterville (sic) on its contract. (T. 265-266). In October and November of 1978, Bor-Son paid all claimants who filed liens on the Estherville project in a total amount of $62,112.72.

On May 29, 1979, Bor-Son filed a claim for $66,184.12 against Fiberglass. On June 5, 1978, Crewmasters filed a claim for $29,456.22 against Fiberglass.

MEMORANDUM

Six issues are presented to this court for resolution. The first issue is a determination of who had title to the funds retained by Bor-Son. Second is the effect of the payments to the subcontractors by Bor-Son. Third is a resolution of the

liability for crane services. Fourth is a decision on whether Fiberglass breached its warranty. Fifth is the question of the claim of Crewmasters. Finally, there is a determination as to whether interest can be paid on the claims of the subcontractors of Fiberglass.

Bor-Son retained the sum of $66,191.31 at the completion of work by Fiberglass. Bor-Son had a right to retain the money pursuant to Paragraph F of the subcontract, but Bor-Son had no claim of title to the funds. It retained the money to ensure that all liens would be satisfied. It did not own the money after Fiberglass completed the work, nor under the contract, could it dispose of the money.

Bor-Son contends that under the doctrine of *Pearlman v. Reliance Ins. Co.*, 371 U.S. 132, 83 S.Ct. 232, 9 L.Ed. 2nd 190 (1962), it had a right to make the payments to the subcontractors despite its knowledge of this action and the filing of the Chapter XI petition and the stay invoked thereby. Its reliance is misplaced.

Pearlman held that a surety obligated to make payments on its bond to subcontractors and employees of a contractor employed by the United States had title to the funds retained by the United States prior to the time title passed to the estate of the debtor. The instant case is distinguishable. Title to the retainage passed to the estate of Fiberglass before any payments were made by Bor-Son. Payment was made out of the funds of Fiberglass. Finally, and most significantly, Bor-Son had no obligation to make the payments. It did so voluntarily, contrary to the order of this court, and solely for its own economic advantage to collect over $400,000 due it on the total project.

But Bor-Son has benefited the estate to the extent it has paid claims which would be allowed. While it should not be

allowed to improve its or the creditors' position, its payments will be considered assignments of the claims. To the extent allowed by this court, these claims may be set off against its liability to Fiberglass. It was stipulated at trial that three of the claims are to be allowed in a total amount of $18,181.13. The claims are: Stall's Farm & Home, $480.26; K & S Lumber Company, $400.87; Dahl Air Conditioning & Heating, $17,-250.00. These may be used to reduce the liability of Bor-Son to Fiberglass.

The remaining payments were disputed by Fiberglass. The liability for crane services is based on Bor-Son's obligation in the subcontract to provide crane services. Bor-Son claims that this obligation terminated when Fiberglass allegedly breached the contract, and it, therefore, did not provide a crane for Fiberglass.

Paragraph 3 of the subcontract calls for Fiberglass to commence "the work of this subcontract" within 3 days of receiving notice to proceed. Fiberglass did not begin installation until 3 months after receiving notice. The contention of Fiberglass is that it began work prior to receiving the notice by designing and manufacturing the tank covers. This contention is contrary to the plain language of the contract viewed as a whole and the intent of the parties. The purpose of the contract was to provide for the installation of the tank covers. The purpose of Paragraph 3 was to allow Bor-Son to have this work begun when the project was ready. Under the interpretation advanced by Fiberglass, no work need be commenced until notice was received. Clearly, this was not the intent of the parties at the time of execution. The actions taken by Fiberglass in designing and manufacturing the tank covers prior to any notice to proceed; in not informing Bor-Son of this contention until 3 months after receiving notice; in prom-

ising to commence work in January; and, in making a $2,000.00 payment for crane services indicate that Fiberglass operated under the same interpretation as Bor-Son.

Fiberglass breached the contract by failing to proceed as scheduled. This court finds that such breach excuses the performance of Bor-Son, that Bor-Son fully performed the contract, and that Bor-Son's damages are measured by the cost of crane services provided to Fiberglass by Holm Brothers Plumbing & Heating in the amount of an additional $12,700.00 paid by Bor-Son.

Bor-Son is entitled to setoff against its liability to Fiberglass, the amount paid by Bor-Son to Holm Brothers Plumbing and Heating, $12,700.00.

Bor-Son also claims a right to set off $3,872.00 paid to correct certain defective work of Fiberglass. The doors were required to be replaced. No evidence was submitted showing any abuse or damage by a third party. The doors were covered by a one year warranty given by Fiberglass in Paragraph 15 of the subcontract.

The warranty given by Fiberglass was to protect Bor-Son in the event the work done and materials used failed to meet contract specifications. The fact the defect did not arise until September 1978 does not alter the obligation of Fiberglass. It is the purpose of the warranty to protect against defects which arise after completion of the work.

The doors, selected and supplied by Fiberglass, were defective and covered by the warranty. Bor-Son is entitled to set off the amount of $3,872.00 against the liability owed to Fiberglass by Bor-Son.

Bor-Son made a payment of $29,526.12 to Crewmasters. Crewmasters made no appearance at trial nor did Bor-Son undertake to represent Crewmasters. Fiberglass presented

evidence showing it had paid Crewmasters and showing that Crewmasters breached its contract causing damages to Fiberglass of $16,106.00.

Bor-Son disputes the proof of Fiberglass in regard to the payment of Crewmasters. It claims Crewmasters applied payments received from Fiberglass on other claims it had against Fiberglass under the doctrine set forth in *General Electric Co. v. Anchor Casualty Co.*, 251 Minn. 305, 87 N.W. 2d 639 (1958). Two elements necessary to apply the doctrine are missing. First, payments must be shown to have been applied to a particular indebtedness. No such showing was made. Second, the creditor must notify the debtor within a reasonable time after application. The only notice was made in this trial and such notice was not made in a reasonable time.

The proper rule to be applied is first money in, first money out. Applying this rule, no money is due on the claim filed by Crewmasters.

In light of the default by Crewmasters and the proofs offered by Fiberglass, the objection to the claim of Crewmasters must be upheld and the claim expunged.

The final issue concerns interest paid by Bor-Son on the claims of the subcontractors. It is well settled that interest is not accrued after the filing of the petition. *American Iron & Steel Mfg. Co. v. Seaboard Air Line Railway Co.*, 233 U.S. 261, 34 S.Ct. 502, 58 L.Ed. 959 (1914). Only in cases where the debtor is ultimately proved solvent is interest allowed. This is not such a case.

CONCLUSIONS OF LAW

1. Jurisdiction is founded on §§2(a)(2), 2(a)(15) and 23(b).

2. Bor-Son Construction, Inc. is liable to Fiberglass Specialty Company, Inc. for the $66,191.31 retained from the subcontract payment to Fiberglass Specialty Company, Inc.

3. Bor-Son Construction, Inc. is entitled to deduct from the amount owed to Fiberglass Specialty Company, Inc. the following payments:

a.	Stall's Farm & Home	$ 480.26
b.	K & S Lumber Company	400.87
c.	Dahl Air Conditioning & Heating	17,250.00
d.	Holm Brothers Plumbing & Heating	12,700.00
e.	Warranty payments	3,872.00
	Total deductions	$34,703.13

4. The claim of Crewmasters, Inc. against Fiberglass Specialty Company, Inc. is expunged.

5. The claim of Bor-Son Construction, Inc. against Fiberglass Specialty Company, Inc. is expunged.

6. Fiberglass Specialty Company, Inc. is entitled to recover the sum of $31,488.18 from Bor-Son Construction, Inc.

ORDER FOR JUDGMENT

In accordance with the foregoing, IT IS ORDERED and ADJUDGED:

1. The claim of Crewmasters, Inc. is expunged. (No. 88)

2. The claim of Bor-Son Construction, Inc. is expunged. (No. 156)

3. Bor-Son Construction, Inc. shall pay to Fiberglass Specialty Company, Inc. the sum of $31,488.18, together with interest from the date judgment is entered.

The foregoing Opinion, based on all the evidence, oral and written, adduced at trial, and based on all pleadings and papers filed therein, constitutes the Findings of Fact, Conclusions of Law and Order for Judgment.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated at St. Paul, Minnesota, this 7th day of April, 1980.

JACOB DIM
Bankruptcy Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION
Civil No. 4-80-316

FIBERGLASS SPECIALTY CO., INC.,
Plaintiff,

v.

BOR-SON CONSTRUCTION, INC.,
Defendant.

ORDER

This matter is before the Court on cross-appeals from an Order of the bankruptcy court in an adversary proceeding between the debtor, Fiberglass Specialty Co., Inc. (Fiberglass) and Bor-Son Construction, Inc. (Bor-Son). T. Jay Salmen, Esquire, and Richard J. Gabriel, Esquire, represent Fiberglass; Jonathan H. Morgan, Esquire, and David J. Allen, Esquire, appear for Bor-Son. The parties have consented to have this matter determined by the undersigned United States Magistrate; an Order of reference was issued by the Honorable Harry H. MacLaughlin, United States District Court Judge, pursuant to Title 28, United States Code, Section 636 (c) on June 25, 1980. The Order of the bankruptcy court is affirmed in all respects.

MEMORANDUM

Bor-Son, the general contractor in charge of the construction of a water pollution control facility for the city of Esterville, Iowa, entered into a subcontract with Fiberglass for $443,000.00 on August 11, 1975 in which Fiberglass agreed to design, manufacture and install tank covers for the facility. Fiberglass then subcontracted with Crewmasters, Inc.[1] to

[1] Crewmasters, Inc. was also known as Ultra Enterprises.

provide labor for the onsite erection of the Fiberglass products. Under the terms of the Bor-Son/Fiberglass contract the debtor was to begin work within three days of receiving notice from Bor-Son (paragraph 3 of the contract). Fiberglass received notice to commence work on the project in December 1976. Fiberglass later notified Bor-Son that it could begin onsite construction in January 1977; however, Fiberglass did not actually begin onsite work on the erection of the tank covers until March 1977. The contract also required Bor-Son to furnish a crane for the unloading and erection of the tank covers. Pursuant to the contract Bor-Son had made a crane available for Fiberglass' use for 27 days in December 1976 and January 1977 after having notified Fiberglass to commence work. When Fiberglass did not appear at the construction site, Bor-Son informed them that they would have to make their own arrangements for the provision of crane services.

When Fiberglass finally appeared at the site in March 1977 they contracted with Holm Brothers for crane service. Holm Brothers billed Fiberglass $14,700.00 for the use of its crane. Fiberglass paid Holm only $2,000.00, being unable to pay the balance. Bor-Son eventually paid the balance of $12,700.00 owing to Holm on November 9, 1978.

The bankruptcy judge found that Fiberglass' failure to commence work in December 1976 was a breach of contract which excused Bor-Son of its duty to provide crane services to Fiberglass. The bankruptcy court found that Bor-Son's damages were $12,700.00, the amount of the additional crane service provided by Holm which was paid by Bor-Son.

Fiberglass completed work on the project in November 1977. Upon completion, Bor-Son, pursuant to paragraph F of the contract, retained $66,191.31 of the contract money owing to Fiberglass to insure payment of all liens from the Fiber-

glass work. Four subcontractors of Fiberglass filed liens and Bor-Son continued to retain these funds. On March 28, 1978, Fiberglass filed for an arrangement under Chapter 11 of the bankruptcy laws, at which time, pursuant to Bankruptcy Rule 11-44 an automatic stay on any actions against the debtor and his property became effective. On April 3, 1978, the bankruptcy judge issued an Order restraining every action and proceedings against Fiberglass and its property. On May 18, 1978 Bor-Son was notified of the filing for an arrangement and a demand was made for the funds retained by Bor-Son. (T. 163-165; Fiberglass Exhibit 14.) On September 18, 1978 Fiberglass commenced an action to recover the money retained by Bor-Son.

On September 29, 1978 Bor-Son notified Fiberglass that certain doors installed by Fiberglass on the project, which were still covered by the warranty of Fiberglass, were defective and had to be replaced. (Bor-Son Exhibit 33.) Fiberglass took no action to correct the work; Bor-Son then had the work done and charged Fiberglass for the amount of the work, $3,872.00 (T. 252-254).

On October 16, 1978, about six months after the filing of the bankruptcy petition, Bor-Son informed Fiberglass that all subcontractors would be paid by Bor-Son if they were not paid by Fiberglass prior to October 23, 1978 (Bor-Son Exhibit 40). Bor-Son, without obtaining the permission of the bankruptcy court, made the payments to the subcontractors so that it could recover over $400,000.00 held by the city of Esterville on its contract (T. 265-266). In October and November of 1978 Bor-Son paid all claimants who had filed liens on the Esterville project in a total amount of $62,112.72. Among the various liens paid by Bor-Son was a payment of $29,526.12 to Crewmasters. Fiberglass presented evidence that it had al-

ready paid Crewmasters the $29,526.12 and that Crewmasters had breached its contract causing damage to Fiberglass in an amount of $16,106.00.

On May 29, 1979, Bor-Son filed a claim for $66,184.12 against Fiberglass. On June 5, 1978, Crewmasters filed a claim for $29,456.22 against Fiberglass. No answer or appearance was made by Crewmasters and the court expunged it claim.

The bankruptcy judge found that Bor-Son was liable to Fiberglass for $66,191.31, the amount retained from Fiberglass under the contract pursuant to paragraph F. The Court also found that Bor-Son was entitled to deduct from the amount owed Fiberglass the following payments that had been made by Bor-Son to creditors of Fiberglass:

A.	Stall's Farm & Home	$ 480.26
B.	K & S Lumber Company	400.87
C.	Dahl Air Conditioning & Heating	17,250.00
D.	Holm Brothers Plumbing & Heating	12,700.00
E.	Warranty payments	3,372.00
	TOTAL DEDUCTIONS	$34,703.13

The bankruptcy judge allowed Bor-Son a credit on the above payments because these payments had benefitted the debtor's estate. The bankruptcy judge refused to allow Bor-Son to deduct the $29,526.12 payment that had been made to Crewmasters. Each party appeals from different portions of the bankruptcy court's order contending that certain findings of the bankruptcy court are not supported by the evidence. Each party also contends that the bankruptcy court erred in interpreting the laws.

It is axiomatic that the bankruptcy court's findings of fact are to be accepted as conclusive unless they are clearly erroneous. See *Matter of PRS Products, Inc.*, 574 F.2d 414, 417 n.4

(8th Cir. 1978); *Mann v. Shepard* (In re Grevich), 570 F.2d 247, 249 n.3 (8th Cir. 1978); *Solari Furs v. United States*, 436 F.2d 683, 684 (8th Cir. 1971). Factual findings are presumptively correct and the complaining party has the burden of clearly demonstrating that error exists. *Friedman v. Fordyce Concrete Inc.*, 362 F.2d 386, 387 (8th Cir. 1966). A finding is clearly erroneous when although there is evidence to support it the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. *Joseph A. Bass Company v. United States*, 340 F.2d 842, 843-844 (8th Cir. 1965).

I have studiously examined the evidence in light of the foregoing rules and have no difficulty in reaching the conclusion that the court's findings of fact are not clearly erroneous and that its conclusions of law and ultimate judgment are not entitled to be disturbed.

Fiberglass Appeal

Fiberglass argues that the bankruptcy judge erred in two respects. First, Fiberglass contends that the bankruptcy judge erred in allowing Bor-Son to deduct $12,700.00 for its payment to Holm Brothers for the crane services provided to Fiberglass. That contention is without merit.

The bankruptcy court reasoned as follows. The Bor-Son/Fiberglass subcontract required Bor-Son to provide crane service to Fiberglass for the erection of the tank covers. That obligation was terminated when Fiberglass breached the subcontract by failing to begin onsite work on the tank covers within three days of receiving notice in December 1976. Fiberglass did not begin actual construction until March 27, 1977. Thus, Bor-Son was not obligated to provide crane service when Fiberglass actually began work. As the later payment of $12,700.00 by Bor-Son for the crane service benefitted the

debtor's estate, Bor-Son's payment could be set off against its liability to Fiberglass for the $66,191.31 that it had withheld in the retainage fund.

Fiberglass advances two lines of reasoning. First, it argues that it did not breach paragraph 3 of the contract, relating to the time at which it was to commence work, because it had already begun fabrication of the panels in its own facilities before the notice was received. Under Fiberglass' interpretation of the contract it had actually commenced work before receiving notice to begin work.

The bankruptcy judge properly construed paragraph 3 of the subcontract. His interpretation rests on a sound basis, both legally and factually, and requires no further elaboration by this Court. In the words of the bankruptcy court:

> "Paragraph 3 of the subcontract calls for Fiberglass to commence 'the work of this subcontract' within three days of receiving notice to proceed. Fiberglass did not begin installation until three months after receiving notice. The contention of Fiberglass is that it began work prior to receiving the notice by designing and manufacturing the tank covers. This contention is contrary to the plain language of the contract viewed as a whole and the intent of the parties. The purpose of the contract was to provide for the installation of tank covers. The purpose of paragraph 3 was to allow Bor-Son to have this work begun when the project was ready. Under the interpretation advanced by Fiberglass, no work need be commenced until notice was received. Clearly this was not the intent of the parties at the time of execution. The actions taken by Fiberglass in designing and manufacturing the tank covers prior to a notice to proceed; in not informing Bor-Son of this intention until three months after receiving

notice; promising to commence work in January; and, in making the $2,000.00 payment for crane services indicates that Fiberglass operated under the same interpretation as Bor-Son."

Second, Fiberglass asserts that there was not sufficient evidence to support a finding of a contract modification which would relieve Bor-Son of its obligation to provide the crane. Fiberglass' argument misses the mark. The bankruptcy judge did not rely on a modification theory in reaching his conclusion. His theory was that breach of the contract by Fiberglass, and not a modification, relieved Bor-Son of its obligation to provide crane service under the contract. See, *Corbin on Contracts*, §975. That Bor-Son cannot establish a right to set off under a modification of contract theory is of no significance whatsoever because neither the bankruptcy court nor Bor-Son has attempted to do so.

Neither did the bankruptcy court err in determining the measure of damages on the Holm Brothers claim. Fiberglass asserts that Bor-Son should not have been allowed to off set the full $12,700.00 it paid to Holm because it was obligated to provide crane service to Fiberglass under the subcontract. That contention is without merit. The breach of Fiberglass is not commencing work in a timely fashion relieved Bor-Son of its contractual obligation to provide crane service. As a result of the breach Fiberglass was obligated to make its own arrangements for crane service and Bor-Son paid the bill. Allowing Bor-Son to off set the full amount of its payment to Holm is not unjust enrichment.

Fiberglass' second major assignment of error is that the court's finding that the doors were defective under the Fiberglass warranty was not supported by the evidence. There was an adequate factual basis in the record from which the bank-

ruptcy judge could have found that Fiberglass breached its warranty with respect to the doors. Robert Wolters, Bor-Son's project manager, testified that from his observation the doors were not of the quality required for a commercial installation (T. 254). The project owner, the City of Esterville, required the door to be corrected prior to final payment (T. 312). In paragraph 15 of the contract Fiberglass guaranteed that its work would conform to the standards of the owner. The "punch list" of June 15, 1978 submitted by the owner's representative also required replacement of the doors (T. 310-311). Also received in evidence were two letters received by Bor-Son to Fiberglass relating to corrective work needed on the doors. Bor-Son eventually paid $3,700.00 to replace them.

Fiberglass argues that the doors were constructed in accord with certain shop drawings (which were prepared by Fiberglass), that the doors were in good working order when installed, and that therefore it is reasonable to assume that any damage was caused by other tradesmen.

The bankruptcy court was not required to accept the statement by Mr. Risgard, the debtor's president, that the doors were acceptable and in working order when installed, and there is no substantial evidence to suggest that other tradesmen on the project were responsible for the damage. The conflicts in the evidence were for the trial court to resolve. I cannot say that the court's finding with respect to the doors was clearly erroneous.

The appeals raised by Fiberglass in this case are without merit.

Bor-Son's Appeal

Bor-Son raises several challenges to the factual findings and legal conclusion of the bankruptcy court with respect to the Court's finding that Bor-Son is liable to Fiberglass for

$31,488.18. It is most convenient to deal with issues raised in the following order.

First, Bor-Son argues that the bankruptcy court made no specific finding of any "overpayment" or "double payment" to Crewmasters, and that in the absence of such a finding Bor-Son should be allowed to deduct the payment it made to Crewmasters just as it was permitted to deduct the payments it made to other creditors of Fiberglass. The bankruptcy court did state that "Fiberglass presented evidence that it had paid Crewmasters."

While it is true that the court did not explicitly state that the $29,526.12 payment to Crewmasters was a "double payment" or "overpayment", such a finding is clearly implicit in the court's holding. The court allowed Bor-Son a credit for those claims it had paid to the extent that the payments had benefitted the debtors estate. Clearly implicit in the court's statement that it would allow a credit for payments that had benefitted the Fiberglass estate, and the court's disallowance of the $29,526.12 payment, is the finding that the payment to Crewmasters was an overpayment which did not benefit the debtor's estate.[2]

Bor-Son goes on to argue that the evidence does not support the finding of a double payment to Crewmasters. It first attacks the credibility of Fiberglass' primary witness, John Rysgaard, the former president of Fiberglass, arguing that Rys-

[2] There is little doubt that the bankruptcy court believed that the payment by Bor-Son to Crewmasters had been a double payment. In the portion of the court's order relating to Bor-Son's contention concerning the doctrine of application of payments the court said at p. 7: "The proper rule to be applied is first money in, first money out. Applying this rule, no money is due on the claim filed by Crewmasters . . . In light of the default by Crewmasters and the proofs offered by Fiberglass, the objection to the claim of Crewmasters must be upheld and the claim expunged."

gaard was not competent to testify under Rule 602 of the Federal Rules of Evidence because he lacked personal knowledge of the transaction. Bor-Son's argument is supported only by a reference in its brief to certain portions of the transcript where Rysgaard states that he never personally visited the construction site in Esterville.

Rysgaard testified that the total of approved invoices received by Fiberglass amounted to $63,654.94, and that Fiberglass had paid Crewmasters $63,940.35 resulting in an overpayment by Fiberglass of $385.31 (T. 49-51). It is axiomatic that determinations of credibility are the province of the bankruptcy judge who had the opportunity to hear the testimony of the witness and observe his demeanor. The fact that Rysgaard had not been present at the construction site does not mean that he could not testify as to invoices received and payments made; the question was whether he could testify as to billings and payments, not whether he had visited the construction site. Rule 602 is no basis for rejecting Rysgaard's testimony.

Bor-Son next contends that the documents relied on by Fiberglass to show that it had already paid Crewmasters were improperly received into evidence and that without such evidence a finding of double payment cannot be made. The gist of the Bor-Son attack is that Exhibit 6, a computer printout listing invoices and payments, did not qualify under the business records exception, Rule 803(6), of the Federal Rules of Evidence.

I find it unnecessary to determine the admissibility of Exhibit 6 under the business records exception. Even if its reception was error, it was harmless error because there was other competent evidence sufficient to support the judgment. It is well settled that a court will not reverse a judgment for

the erroneous reception of evidence where there is other competent evidence to support it. *Lovett v. Shuster*, Slip Op. 80-1316, October 22, 1980, Eighth Circuit.

There was other competent evidence in the form of the testimony of Mr. Rysgaard, Exhibit 7, a "summary of facts relative to Ultra/Crewmasters," and Exhibit 8, "checks issued by Fiberglass to Crewmasters," to support the finding. The "summary of facts" was based upon an abstract of all checks issued to Crewmasters under the agreement for work performed as evidenced by invoices received by Fiberglass. Rysgaard personally reviewed all invoices during an audit used in preparing the summary.

The reception into evidence of the summary of fact was clearly proper. Summaries of accounting or detailed records have long been approved for evidential use before juries or judges. The use of such summaries is not only proper, but also advisable and their use is to be encouraged where it facilitates the understanding of complex factual issues. See *Boston Securities, Inc. v. U. S. Bonding Insurance Co.*, 441 F.2d 1302, 1303 (8th Cir. 1971); *United States v. Smallwood*, 443 F.2d 535, 540 (8th Cir. 1971); *Peter Kiewit Sons Company v. Summit Construction Company*, 422 F.2d 242, 266-267 (8th Cir. 1969); *United States v. Strauss*, 473 F.2d 1262, 1263 (3rd Cir. 1973). The admission and use of such summaries rests with the sound discretion of the trial judge, whose actions in allowing their use may not be disturbed in an appellate court except for an abuse of discretion. *Smallwood, supra*, 443 F.2d at 540. Mr. Rysgaard, who prepared the summary, was available for cross-examination during trial, and the records upon which the summary was based were available to Bor-Son and introduced into evidence at trial. It cannot be said that the court abused its discretion in these circumstances. The testimony of Mr.

Rysgaard, the summary of facts, and the checks themselves were sufficient to support a finding of an overpayment to Crewmasters.

Bor-Son argues that the summary of facts, Exhibit 6, was based upon the computer printout, Exhibit 7, and since Exhibit 7 was not admissible neither is Exhibit 6. That argument is not supported by the record. While it is true that Rysgaard partially relied upon the printout in preparing the summary, his later testimony clearly indicates that the printout was not his only source. Also relied upon was an abstract of all checks issued to Crewmasters and a complete recap of individual invoices received from them. (T. 49, 91-93). Furthermore, there was nothing contained in the computer printout relevant to this issue that was not also verified by the checks and invoices. There was sufficient competent evidence to support a finding of an overpayment to Crewmasters by Bor-Son.

Although Bor-Son presented evidence suggesting that no double payment had been made, the weight to be accorded such evidence, in light of the conflicting evidence offered by Fiberglass, was to be determined by the bankruptcy court. I am not left with a definite and firm conviction that an error has been committed and accordingly find the evidence sufficient to support a finding of an overpayment by Bor-Son.

Bor-Son's second major argument is that under the rule announced in *Pearlman v. Reliance Insurance Company*, 371 U.S. 132 (1962), it was entitled to the money in the retainage fund; that the fund was, as a matter of law, not the property of Fiberglass; and that it was entitled to make the payment to Crewmasters from the fund. Bor-Son's reliance on *Pearlman* is misplaced. In *Pearlman* a contractor entered into a contract with the government to perform construction work on the St. Lawrence seaway project. As required by statute,

the contractor also secured from an insurance company two bonds guaranteeing the performance of the work and payment to all persons supplying labor for the job. Under the contract the government was authorized to retain and hold a percentage of estimated amounts due monthly until final completion. The contractor defaulted, terminated its contract with the government by agreement, and the surety paid laborers and materialmen to discharge debts of the contractor to the laborers and materialmen. The contractor then filed for bankruptcy and a dispute arose between the trustee and the surety as to rights to the retainage fund.

The sole issue was "whether the surety had, as it claimed, ownership of an equitable lien on, or a prior right to this fund before bankruptcy adjudication." 371 U.S. at 136. Applying well settled principles of equitable subrogation, the court found that the surety had obtained an interest in the retainage fund by virtue of its payment to the laborers and that its interest in the fund, which existed prior to the filing of the bankruptcy, did not divolve to the trustee when the contractor filed for bankruptcy.[8] *Pearlman* turned on well settled principles of equitable subrogation: a surety who pays the debt of another is entitled to all the rights of the person he paid to enforce his right to be reimbursed. 371 U.S. at 136-137. Bor-Son argues that under the principle of equitable subrogation announced in *Pearlman*, the retainage fund was not the property of the debtor and did not become subject to the jurisdiction of the bankruptcy court. That case is distinguishable for the following reasons.

---

[8] The filing of a bankruptcy petition creates an estate comprised of all legal and equitable interests of the debtor in property. This estate passes to the trustee in bankruptcy upon filing of the petition. See *Missouri v. United States Bankruptcy Court*, Slip Op. 80-2179, April 8, 1981, Eighth Circuit.

First, the laborers and materialmen who were paid by the surety in *Pearlman* had valid claims against the bankrupt contractor; Crewmasters, on the other hand, had no right to any of the money in the retainage fund because it had already been paid the amount owing it by Fiberglass. There was no debt owing to Crewmasters by Fiberglass at the time Bor-Son made the payment. Bor-Son cannot make a gratuitous payment to Crewmasters and then deduct that payment from the amount it owed to Fiberglass.

Second, even if there had been no double payment to Crewmasters the *Pearlman* decision would still be inapplicable. Bor-Son misapprehends the fundamental principles of equitable subrogation underlying that decision. The crucial distinguishing feature is that the surety in *Pearlman* made its payment to the laborers before the contractor filed for bankruptcy. In *Pearlman*, the surety's equitable interest in the retainage fund, which it acquired under principles of equitable subrogation, arose prior to the commencement of the bankruptcy, and the court simply held that this equitable interest of the surety was not the property of the bankrupt contractor and therefore could not pass to the trustee in bankruptcy as part of the bankrupt contractor's estate.

Bor-Son, on the other hand, made the payment in question here after the commencement of the Chapter 11 proceedings. In this case, Bor-Son, unlike the surety in *Pearlman*, had not acquired any interest through equitable subrogation at the time the petition was filed; it did not make the payment to Crewmasters until after the filing and after the bankruptcy court had acquired jurisdiction over the debtor's interest in the fund. Once Fiberglass' interest in the fund became subject to the jurisdiction of the bankruptcy court by virtue of the filing of the petition, Bor-Son could not acquire a superior

interest in the fund under principles of equitable subrogation by virtue of a payment to a creditor of Fiberglass which was neither authorized by the contract nor approved by the bankruptcy court.

Similarly, Bor-Son's contention that "Fiberglass had absolutely no property interest in the [retainage] fund whatsoever" is without merit. Bor-Son concedes in its brief (p. 4) that Fiberglass performed all of its field work under the contract. Bor-Son argues that Fiberglass was not entitled to the fund because Fiberglass breached subparagraph 2 of the contract, which required it to pay all its subcontractors promptly and to keep the project free and clear of all claims and liens arising from its work. While it appears undisputed that liens were filed on the project, that fact did not divest Fiberglass of its interest in the fund or give Bor-Son a right to pay the creditors of Fiberglass with the retainage. In subparagraph F of the contract, the parties themselves agreed on the course to be followed if creditors of Fiberglass filed claims against the project. Under that paragraph Bor-Son was given the authority to withhold money owing to Fiberglass and to hold it in a retainage fund pending legal settlement of the claims. That paragraph provides:

> "F. If notification of any claims have been made against the Subcontractor or the Contractor arising out of labor or materials furnished the project or otherwise on account of any actions or failures to act by the Subcontractor in the performance of this Subcontract, the Contractor may at his discretion, withhold such amounts otherwise due or to become due hereunder to cover said claims and any costs or expenses arising or to arise in connection therewith pending legal settlement thereof."

This provision did not give Bor-Son authority to unilaterally determine the validity of, and make payment on, such claims. Neither does it provide that Fiberglass loses its interest in the fund in the event claims are filed. It only allows Bor-Son to withhold funds until "legal settlement" of the claims. Subparagraph F set out the procedures to be followed in the event creditors of Fiberglass filed claims against the project; it did not authorize Bor-Son to pursue the course of action that it undertook. Fiberglass had performed all of its field work under the contract and the interest of Fiberglass in the fund was "property of the debtor" over which the bankruptcy court acquired jurisdiction upon the filing of the petition.

Bor-Son's third argument is that Fiberglass is barred from raising the defense that it had previously paid Crewmasters because payment is an affirmative defense which Fiberglass waived by failing to raise it in its reply to Bor-Son's counterclaim. Rule 8(c) of the Federal Rules of Civil Procedure requires a party to set forth affirmative defenses, such as payment, in its pleadings.

That Fiberglass did not plead payment as a defense in its reply to the counterclaim is no basis for disturbing the bankruptcy court's judgment. The issue as to the overpayment was fully tried before the bankruptcy judge. Where an affirmative defense that was not pled is fully tried, evidence regarding it is received, and no objection is made on the ground that the evidence is not within the issues raised by the pleadings, a pleading may be deemed to be amended to conform to the proof. See Federal Rule of Civil Procedure 15(b). Most importantly, Bor-Son does not even allege that it was in any way prejudiced by the failure of Fiberglass to plead payment as an affirmative defense. A mere technical violation of Rule 8(c), without even an allegation of prejudice by Bor-Son, is no basis for disturbing the trial court's decision.

Bor-Son's fourth major argument is that even if there was an overpayment by Bor-Son, and even if Fiberglass is not barred from attempting to establish such an alleged overpayment under Rule 8(c), Fiberglass must nevertheless bear such cost because of 1) negligence, 2) estoppel, 3) ratification, 4) indemnity, and 5) restitution. It does not appear from the record that these issues were raised at trial and the bankruptcy judge made no findings or conclusions with respect to them. An appellate court should not rule on issues raised for the first time on appeal which have not been addressed by the trial court. This court should review only those issues decided by the trial court which were properly presented to it. *Union Bank v. Blum*, 460 F.2d 197, 202 (9th Cir. 1972); *In re Gardner*, 455 F.Supp. 327, 329 (N. D. Ala. 1978).

Bor-Son next argues that Fiberglass is liable for Bor-Son's payment to Crewmasters under the law of application of payments, *General Electric Co. v. Anchor Casulty* (sic) *Co.*, 251 Minn. 305, 87 N.W.2d 639 (1958). Bor-Son argues that even if Fiberglass had already paid Crewmasters for the work done at the Esterville (sic) project, Crewmasters had applied those payments as credit for work done by it for Fiberglass on other construction projects. Therefore, Bor-Son's payment to Crewmasters did not constitute a double payment.

The only evidence to suggest that Crewmasters ever made such an allocation is a summary sheet sent by Crewmasters to Fiberglass after the bankruptcy petition had been filed which lists billings by Crewmasters of $40,015.85 and a partial payment by Fiberglass of $10,559.63. The summary sheet contains no information relative to payments made on other projects. The doctrine of application of payments requires that (1) the payments must be shown to have been applied to a particular indebtedness and (2) the creditor must notify the

debtor within a reasonable time after the application. The summary sheet referred to above, Bor-Son Exhibit 1, is not adequate to establish that an application of payments had been made by Crewmasters. Even if it were adequate to show a particular application of payments, Fiberglass was not given reasonable notice of the application.

Finally, Bor-Son claims that the bankruptcy court erred in refusing to give it credit for interest it paid on the claims of the Fiberglass creditors. The bankruptcy court held that interest on claims against a debtor does not accrue after the filing of the petition and is allowed only in cases where the debtor is ultimately proved solvent. *American Iron & Steel Mfg. Co. v. Seaboard Air Line*, 233 U.S. 261 (1914); *Sexton v. Dreyfus*, 219 U.S. 339 (1911); *Collier* Vol. 3A §63.16. Bor-Son has cited no authority to the contrary.

The bankruptcy court's order is in all respects affirmed.

FLOYD E. BOLINE
United States Magistrate

Dated: May 18, 1981.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 81-1647

In re: Fiberglass Specialty Co., Inc.,

Appellee,

v.

Bor-Son Construction, Inc.,

Appellant.

Appeal from the United States District Court for the District of Minnesota.

Submitted: December 15, 1981
Filed: May 19, 1982

Before LAY, Chief Judge, HENLEY and ARNOLD, Circuit Judges.

LAY, Chief Judge.

At issue in this appeal is the bankruptcy court's jurisdiction to adjudicate the respective rights of a bankrupt subcontractor and a general contractor in money retained by the general contractor under their subcontract.

On June 29, 1975, Fiberglass Specialty Co. entered into an agreement to design, manufacture, and install tank covers on a water pollution control facility being built in Estherville, Iowa, by Bor-Son Construction, Inc. Thereafter, Fiberglass subcontracted with Crewmasters to provide labor for the installation. Fiberglass began erecting the tank covers in March 1977. It completed work in November 1977. Upon com-

pletion, Bor-Son retained $66,191.31 of the contract money to ensure payment of all liens arising from the work of Fiberglass. Under clause two of the subcontract, Fiberglass agreed:

> To pay for all materials, skills, labor and equipment used in or in connection with the performance of this Subcontract, when and as bills or claims therefor become due, and to save and protect the Project, the Owner, and the Contractor from all claims and mechanics' liens on account thereof, and to *furnish satisfactory evidence to the Contractor when and if required*, that he has complied with the above requirements. This provision shall not be construed as a waiver of the right of the Subcontractor to file and enforce a lien claim as against the Owner in the event of the Contractor's failure to pay the Subcontractor.

(Emphasis added.)

Clause F of the subcontract provided:

> If notification of any claims have been made against the Subcontractor or the Contractor arising out of labor or materials furnished the Project or otherwise on account of any actions or failures to act by the Subcontractor in the performance of this Subcontract, the Contractor may, at his discretion, withhold such amounts otherwise due or to become due hereunder to cover said claims and any costs or expenses arising or to arise in connection therewith pending legal settlement thereof. This right of the Contractor shall not be exclusive of any other rights of the Contractor herein or by law provided.

Four subcontractors of Fiberglass filed liens on the project. On March 28, 1978, Fiberglass filed in bankruptcy court for an arrangement under Chapter XI of the Bankruptcy Act of 1898.[1] Pursuant to rule 11-44, an automatic restraint on any actions against the debtor and its property became effective. On April 3, 1978, the bankruptcy court restrained every action and proceeding against Fiberglass and its property. On May 18, 1978, Fiberglass notified Bor-Son of the filing and demanded payment of the funds retained by Bor-Son. On September 18, 1978, Fiberglass commenced an action in bankruptcy court to recover the funds retained by Bor-Son.

On September 29, 1978, Bor-Son notified Fiberglass that certain doors installed by Fiberglass had to be replaced. Bor-Son told Fiberglass that the doors were defective and that they were covered by Fiberglass' warranty. Fiberglass took no steps to correct the defect and Bor-Son had the work done and backcharged Fiberglass. The amount expended to replace the doors was $3,872.00

On October 16, 1978, Bor-Son informed Fiberglass that all subcontractors would be paid by Bor-Son if they were not paid by Fiberglass prior to October 23, 1978. In October and November of 1978, Bor-Son, without obtaining the permission of the bankruptcy court, paid all claimants who filed liens on the Estherville project, payments totaling $62,112.72. Among the payments allegedly made was a payment to Crewmasters of $29,526.12.

On May 29, 1979, Bor-Son filed a claim for $66,184.12 against Fiberglass in bankruptcy court. Thereafter, on June

[1] The 1898 act rather than the Bankruptcy Act of 1978, which became effective on October 1, 1979, governs this case. *See* Pub. L. No. 95-598, 92 Stat 2549, 2682 (1978).

5, 1978, Crewmasters filed a claim for $29,456.22 against Fiberglass in bankruptcy court.[2]

The bankruptcy judge found Bor-Son liable to Fiberglass for the amount retained by Bor-Son under the subcontract. The judge concluded that all but one of the payments Bor-Son had made to Fiberglass' subcontractors benefited the debtor's estate. He allowed Bor-Son to deduct $34,703.13 from the retainage fund. However, the bankruptcy judge refused to allow a deduction for the payment to Crewmasters. The judge found that Fiberglass had already paid Crewmasters the $29,526.12. Judgment was thereafter rendered against Bor-Son and in favor of Fiberglass for $31,488.18 plus interest. The parties consented to have the case reviewed by a United States Magistrate. The magistrate affirmed the order of the bankruptcy court in all respects. Bor-Son appeals.

Issues.

Bor-Son contends that the retained money was not Fiberglass' property and thus that it did not violate an order of the bankruptcy court by paying the lien holders. Bor-Son also urges that even if the retainage is Fiberglass' property, Bor-Son is entitled to set off the payment to Crewmasters. Bor-Son argues that it was prejudiced by Fiberglass' failure to plead payment as an affirmative defense to Bor-Son's counterclaim. It also claims that Fiberglass must bear the loss of any alleged prior payment because of principles of (1) negligence, (2) estoppel, (3) ratification, (4) indemnity, and (5) restitution. In addition, Bor-Son contends that there was insufficient competent evidence to support a finding of overpayment to Crewmasters and that under the law of application of payments Fiberglass cannot recover the amount Bor-Son

---

[2] Crewmasters did not appear at trial and the bankruptcy court expunged its claim.

paid to Crewmasters. Finally, Bor-Son contends it is not liable for interest paid to Fiberglass' subcontractors.

Jurisdiction.

Bor-Son alleges the retained funds were not Fiberglass' property. Although Bor-Son does not directly raise the issue, this allegation requires us to examine the bankruptcy court's jurisdiction to adjudicate the claim. Section 311 of the Bankruptcy Act provides:

> Where not inconsistent with the provisions of this chapter, the court in which the petition is filed shall, for the purposes of this chapter, have exclusive jurisdiction of the debtor *and his property*, wherever located.

11 U.S.C. § 711 (1979) (emphasis added).

The bankruptcy court cannot assert jurisdiction over a res in which the debtor does not have a property interest.

The bankruptcy court has jurisdiction over property in the actual and constructive possession of the debtor. It is well settled that property held by another is not in the constructive possession of the debtor if there is a substantial adverse claim to the property. *Harrison v. Chamberlin*, 271 U.S. 191, 195 (1926); *Bradley v. St. Louis Terminal Warehouse Co.*, 189 F.2d 818, 824 (8th Cir. 1951). This analysis has been applied to choses in action held by the bankrupt. *See Willyerd v. Buildex Co.*, 463 F.2d 996, 999-1000 (6th Cir. 1972); *In re Lehigh Valley Railroad Co.*, 458 F.2d 1041, 1043-44 (3rd Cir. 1972); *In re Co-Build Companies, Inc.*, 408 F. Supp. 717 (E.D. Pa. 1976).[8]

In this case, we must decide if Fiberglass held a property interest under the Bankruptcy Act in the fund retained by

---

[8] If an obligor admits the obligation to the bankrupt and its amount, the bankruptcy court may exercise jurisdiction over the property immediately. *See In re Lehigh Valley Railroad Co.*, 458 F.2d 1041, 1044 (3rd Cir. 1972).

Bor-Son. If Fiberglass simply had a contractual cause of action, Fiberglass or the trustee in bankruptcy can only enforce the contract in a court of general jurisdiction. *See In re Standard Gas & Electric Co.*, 119 F.2d 658, 661-62 (3d Cir. 1941); 4A Collier on Bankruptcy ¶ 70.28[1], at 389 (J. Moore and L. King 14th ed. 1978).

Other federal courts which have confronted this issue have held that the bankrupt subcontractor has only a cause of action under the subcontract which must be enforced in a court of general jurisdiction. *See Green v. H. E. Butt Foundation*, 217 F.2d 553 (5th Cir. 1954); *In re H. L. Gentry Construction Co.*, 200 F. Supp. 546 (E.D. Mich. 1961), *aff'd*, 314 F.2d 945 (6th Cir. 1963); *cf. Bayview Estates, Inc. v. Bayview Estates Mobile Homeowners Association*, 508 F.2d 405 (6th Cir. 1974) (rent held in escrow); *In re Wiltse Brothers Corp.*, 357 F.2d 190 (6th Cir. 1966) (bankruptcy court had jurisdiction because no liens filed against project); *Polish v. Johnson Service Co.*, 333 F.2d 545 (3d Cir. 1964) (retained fund does not vest in bankruptcy trustee under section 70a). *But see Butler v. Pacific National Insurance Co.*, 375 F.2d 518 (9th Cir. 1967) (fund retained by state pursuant to statute).

We find the money retained by Bor-Son is not Fiberglass' property. Bor-Son was not in the position of a trustee or bailee. Bor-Son retained the money under a claim of right arising from clause F of the subcontract. *See Willyerd v. Buildex Co.*, 463 F.2d 996, 999-1000 (6th Cir. 1972) (no jurisdiction to enforce payment under construction contract when breach alleged). At the time the bankruptcy petition was filed, Fiberglass' right to the funds was not undisputed and had not been established. Almost 60 years ago, Justice Brandeis described the nature of a contract creditor's claim against his debtor:

> [A]n unsecured simple contract creditor has, in the absence of statute, no substantive right, legal or equitable, in or to the property of his debtor. This is true, whatever the nature of the property; and, although the debtor is a corporation and insolvent. The only substantive right of a simple contract creditor is to have his debt paid in due course.

Pusey & Jones Co. v. Hanssen, 261 U.S. 491, 497 (1923).

We conclude that Fiberglass possessed merely a chose in action against Bor-Son and that the bankruptcy court therefore lacked jurisdiction to adjudicate the parties' respective rights to the retained funds.[4] We thus reverse and remand the case to the district court with direction to vacate the order of the bankruptcy court for lack of jurisdiction.

---

[4] Because we find that the bankruptcy court lacked jurisdiction to hear this case, we need not address the substantive issues raised by Bor-Son.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
September Term 1981
No. 81-1647

In Re:

FIBREGLASS SPECIALTY CO., INC.,

Appellee,

vs.

BOR-SON CONSTRUCTION, INC.,

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

Petition of appellee for rehearing filed in this cause having been considered, it is now here ordered by this Court that the same be, and it is hereby, denied.

June 21, 1982.